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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/831,094	11/21/2001	Elisa J. Bernklau	2730-65-PUS	8451

7590 12/31/2003
Joseph E Kovarik
1560 Broadway Suite 1200
Denver, CO 80202-5141

EXAMINER

ARK, DARREN W

ART UNIT	PAPER NUMBER
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3643

DATE MAILED: 12/31/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/831,094

Applicant(s)

BERNKLAU ET AL.

Examiner

Darren W. Ark

Art Unit

3643

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 20 November 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☒ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☐ The a) ☐ affidavit, b) ☐ exhibit, or c) ☐ request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☐ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:


Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: 10-46.

Claim(s) withdrawn from consideration: _____.

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____.


Darren W. Ark
Primary Examiner
Art Unit: 3643

Continuation of 2. NOTE: Proposed new claims 47-98 raise new issues requiring further consideration and/or search and also are new claims which are presented without canceling a corresponding number of finally rejected claims. Claim 46 does not positively recite the emitting source being in the enclosure since the proposed phrase "an enclosure having an interior for containing an emitting source" is merely a functional recitation that it is capable of containing such emitting source. In regard to applicant's arguments concerning claims 10, 25, 45, and 46 with respect to Schmittman, the Examiner contends that the apparatus and method claims are met since the Schmittman patent discloses a device provides the concentration of gas as claimed. There is no upper limit recited in the claims that excludes the use of Schmittman as an applicable reference in the rejections presented. With regard to applicant's arguments concerning the phrase "for at least two weeks...", the Examiner contends that the concentration is capable of being maintained by the gas source being replenished and furthermore this limitation does not set forth any structure not disclosed by Schmittman. Furthermore the carbon dioxide can seep into the ground and at the outermost extents of its travel can be at levels that are not lethal. In regard to applicant's arguments concerning the Snell et al. patent, the Examiner contends that applicant's disclosure stated the attractiveness of the expanded foam having carbon dioxide therein and that coatings could be placed thereon to minimize the release of the carbon dioxide so as to reduce its attractiveness to termites. Furthermore, it is clearly stated at col. 28, lines 1-12 that the foam material releases carbon dioxide which is clearly attractive to the termites for that specific reason. In regard to applicant's arguments regarding Snell et al. in view of Nicolas, the Examiner contends that a person of ordinary skill in the art would readily determine the ideal levels of carbon dioxide or mimic to attract termites to the device through routine experimentation since the basic premise of attracting the termites using carbon dioxide was taught by the Snell et al. patent and that further refinement would make the device as attractive as possible through this experimentation given Nicolas' teaching that there are certain levels which have been recorded in the field and are particularly effective in attracting a particular insect species.